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3 UNITED STATES DISTRICT COURT  
4 WESTERN DISTRICT OF WASHINGTON  
5 AT TACOMA

6 CHRISTOPHER BRADY HOWARD,

7 Plaintiff,

8 v.

9 STATE OF WASHINGTON  
10 DEPARTMENT OF CORRECTIONS,  
11 GRANT COUNTY DEPARTMENT OF  
12 CORRECTIONS, AMANDA GREEN, KIM  
13 ALLEN, MERRESSA DAVIS, ANMARIE  
14 AYLWARD, LAURIE PETERS, MAGGIE  
15 MILLER-STOUT, and STEVEN SINCLAIR,

16 Defendants.

No. C11-5795 RBL/KLS

**REPORT AND RECOMMENDATION**  
**Noted For: December 23, 2011**

17 This matter has been referred to Magistrate Judge Karen L. Strombom pursuant to 28  
18 U.S.C. § 636(b)(1), Local Rules MJR 3 and 4. Plaintiff's application to proceed *in forma*  
19 *pauperis* (ECF No. 1) is pending. The Court reviewed Plaintiff's proposed civil rights  
20 complaint and determined that the complaint seeks relief in habeas. ECF No. 1-1. Plaintiff has  
21 also filed a petition for writ of habeas corpus in Case No. 11-5791RJB.<sup>1</sup> For that reason, the  
22 Court declined to serve the complaint in this case and asked Plaintiff to show cause why this case  
23 should not be dismissed. In the meantime, the Court held his application to proceed *in forma*  
24 *pauperis* (ECF No. 1) pending Plaintiff's response so that Plaintiff would not incur the \$350.00  
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26 <sup>1</sup> Case No. 11-5791 has since been transferred to the Eastern District of Washington pursuant to 28 U.S.C. § 2241(d), as the Eastern District of Washington is both the district of Plaintiff's confinement and the district of his state court conviction.

1 filing fee debt. Plaintiff filed an affidavit and exhibits. ECF Nos. 11 and 12. The filings only  
2 confirm that Plaintiff seeks relief in habeas and that therefore, this complaint should be  
3 dismissed.

#### 4 **DISCUSSION**

5 Under the Prison Litigation Reform Act of 1995, the Court is required to screen  
6 complaints brought by prisoners seeking relief against a governmental entity or officer or  
7 employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint  
8 or portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that  
9 fail to state a claim upon which relief may be granted, or that seek monetary relief from a  
10 defendant who is immune from such relief. 28 U.S.C. §§ 1915A(b)(1), (2) and 1915(e)(2); See  
11 *Barren v. Harrington*, 152 F.3d 1193 (9th Cir. 1998). A complaint is legally frivolous when it  
12 lacks an arguable basis in law or fact. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Franklin v.*  
13 *Murphy*, 745 F.2d 1221, 1227-28 (9th Cir. 1984). A complaint or portion thereof, will be  
14 dismissed for failure to state a claim upon which relief may be granted if it appears the “[f]actual  
15 allegations . . . [fail to] raise a right to relief above the speculative level, on the assumption that  
16 all the allegations in the complaint are true.” See *Bell Atlantic, Corp. v. Twombly*, 127 S.Ct.  
17 1955, 1965 (2007)(citations omitted). In other words, failure to present enough facts to state a  
18 claim for relief that is plausible on the face of the complaint will subject that complaint to  
19 dismissal. *Id.* at 1974.

20 To state a claim under 42 U.S.C. § 1983, a complaint must allege: (i) the conduct  
21 complained of was committed by a person acting under color of state law and (ii) the conduct  
22 deprived a person of a right, privilege, or immunity secured by the Constitution or laws of the  
23 United States. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 687 L.Ed.2d 420 (1981),  
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1 *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986). Section 1983 is the  
2 appropriate avenue to remedy an alleged wrong only if both of these elements are present.  
3 *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985).

4 On the basis of these standards, Plaintiff has failed to state a claim upon which relief can  
5 be granted. Plaintiff purports to sue various employees of the Department of Corrections  
6 because he is being held past his release date of June 28, 2011. ECF No. 1-1, p. 3. Plaintiff  
7 alleges that as a result of his unlawful and continued detention, he has been forced to withdraw  
8 from a vocational program thus extending the time in which he can become retrained and  
9 reemployed. He alleges that he has missed the birth of his child and is suffering physical,  
10 emotional and financial burdens. *Id.*

12 In his Affidavit filed on October 7, 2011, Plaintiff states that he recently filed a personal  
13 restraint petition in Washington state court in July and a motion in Superior Court asking his  
14 sentencing court to amend his judgment and sentence. He also filed a tort claim against the State  
15 of Washington and acknowledges that he filed the petition for writ of habeas corpus in Case No.  
16 C11-5791 RJB/KLS. ECF No. 11 at 2.

18 When a person confined by government is challenging the very fact or duration of his  
19 physical imprisonment, and the relief he seeks will determine that he is or was entitled to  
20 immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ  
21 of habeas corpus. *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). In order to recover damages  
22 for an alleged unconstitutional conviction or imprisonment, or for other harm caused by actions  
23 whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove  
24 that the conviction or sentence has been reversed on direct appeal, expunged by executive order,  
25 declared invalid by a state tribunal authorized to make such determination, or called into  
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1 question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. *Heck v.*  
2 *Humphrey*, 512 U.S. 477, 486-87 (1994).

3 In addition, prisoners in state custody who wish to challenge the length of their  
4 confinement in federal court by a petition for writ of habeas corpus are first required to exhaust  
5 state judicial remedies, either on direct appeal or through collateral proceedings, by presenting  
6 the highest state court available with a fair opportunity to rule on the merits of each and every  
7 issue they seek to raise in federal court. *See* 28 U.S.C. § 2254(b)(c); *Granberry v. Greer*, 481  
8 U.S. 129, 134 (1987); *Rose v. Lundy*, 455 U.S. 509 (1982); *McNeeley v. Arave*, 842 F.2d 230,  
9 231 (9th Cir. 1988). State remedies must be exhausted except in unusual circumstances.  
10 *Granberry, supra*, at 134. If state remedies have not been exhausted, the district court must  
11 dismiss the petition. *Rose, supra*, at 510; *Guizar v. Estelle*, 843 F.2d 371, 372 (9th Cir. 1988).  
12 As a dismissal solely for failure to exhaust is not a dismissal on the merits, *Howard v. Lewis*, 905  
13 F.2d 1318, 1322-23 (9th Cir. 1990), it is not a bar to returning to federal court after state  
14 remedies have been exhausted.  
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## 17 CONCLUSION

18 Because Plaintiff seeks an earlier release from confinement and damages relating to his  
19 continued confinement, his action is not cognizable under 42 U.S.C. § 1983. His proper course  
20 of action is to challenge his incarceration through a personal restraint petition in state court. As  
21 his pleadings reflect, Plaintiff is already pursuing his state court remedies and he has already  
22 filed a federal habeas petition. *See, Howard v. Washington Department of Corrections and*  
23 *Lang*, Case No. 11-5791 RJB/KLS. Accordingly, it is recommended that Plaintiff's complaint  
24 be dismissed for failure to state a cognizable claim under 42 U.S.C. § 1983 and that his  
25 application to proceed *informa pauperis* (ECF No. 1) be **DENIED**.  
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1 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil  
2 Procedure, the parties shall have fourteen (14) days from service of this Report to file written  
3 objections. See also Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those  
4 objections for purposes of appeal. *Thomas v Arn*, 474 U.S. 140 (1985). Accommodating the  
5 time limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on  
6 **December 23, 2011**, as noted in the caption.  
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9 **DATED** this 30th day of November, 2011.

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12 Karen L. Strombom  
13 United States Magistrate Judge  
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